MAY 2 9 1998

STATE OF MAINE

Kennebec, ss.

Board of Overseers of the Bar Grievance Commission

File Nos. GCF 96-G-146 and GCF 96-G-189

BOARD OF OVERSEERS OF THE BAR,)
Petitioner)
v.) REPORT OF PROCEEDINGS,) FINDINGS, CONCLUSION,
ELIZABETH KELLY EBITZ, ESQ. and CARL F. RELLA, ESQ.,) AND DISPOSITION)
Respondent))

I. PROCEDURE

A hearing in this matter was conducted by Panel A of the Grievance Commission on May 12, 1998, in the conference room of the offices of the Board of Overseers of the Bar, Augusta, Maine. Both of the regular attorney panel members had recused themselves, and the panel was therefore composed of Susan E. Hunter, Esq., of Portland, as acting Chair; Patricia Worth, Esq., of Belfast; and Andrew Pease of Bangor. There were no objections to the composition of the Panel. The Board was represented by Geoffrey S. Welsh. Respondent Elizabeth Kelly Ebitz was present and represented by Peter DeTroy. Respondent Carl F. Rella was present and represented by Malcolm Lyons. Each of these complaints arose from the same facts and circumstances and the matters were consolidated for hearing. Both respondents Elizabeth Ebitz and Carl Rella testified, as did Michael Demmons and attorney Margaret Shaloob of Bangor. Board Exhibits 1 through 33 were admitted. Rella Exhibits 1 through 24 were admitted at the beginning of the hearing without objection.

II. FACTS

This case arose out of an underlying personal injury claim wherein Clyde Smith of Bangor, who had been injured on the property owned by Michael Demmons, hired Attorney Elizabeth Ebitz to assist him in obtaining recovery for his injury. Attorney Ebitz represented Mr. Smith for approximately one year during which time she communicated with the adjuster for Mr. Demmons' insurance company, Concord Group. By letter dated March 13, 1996, Attorney Ebitz made a demand for settlement on the claims adjuster, Mr. Oullette. The adjuster did not believe the insurance company was liable for damages under the circumstances in which Mr. Smith had been injured. He therefore contacted Attorney Rella and asked him to review the file with regard to the issue of liability. Attorney Rella not only reviewed the file, but, after contacting Concord Group for permission, also spoke with the insured, Michael Demmons, about the circumstances surrounding Mr. Smith's injury. Based on his review of the file and on his meeting with Mr. Demmons, Attorney Rella told the adjuster that he agreed that this was a no liability case. Shortly after that, Attorney Rella received a call from Attorney Ebitz on or about May 9, 1996, and subsequent to Concord Group's having denied the claim. Evidently, in the course of her conversation with the adjuster, Attorney Ebitz learned that the adjuster had communicated with Attorney Rella and that Attorney Rella had agreed on the no liability position. Attorney Ebitz called Attorney Rella to discuss this with him and, presumably, to attempt to change his mind. Attorney Ebitz had, as part of her file, an affidavit from Mr. Demmons dated April 10, 1995, (affidavit #1) that she thought established liability in the matter (Board Exhibit #1). Attorney Rella disagreed and felt that there were several shortcomings in the affidavit. On May 16, 1996, Mr. Demmons executed "affidavit number 2" at Attorney Ebitz' office (Board Exhibit 5). Although there are some discrepancies between Mr. Demmons' testimony and Attorney Ebitz'

testimony, it is clear that Mr. Demmons arrived at Attorney Ebitz' office with Mr. Smith, spent some time talking about the matter with Attorney Ebitz, who had not met Mr. Demmons prior to this time, and then executed "affidavit number 2."

Thus arose Attorney Rella's complaint against Attorney Ebitz: that she had spoken with his client without his permission in violation of Maine Bar Rule 3.6(f). Board Exhibit 9. After several attempts to communicate by telephone, Attorneys Rella and Ebitz finally spoke on May 31 and had a heated exchange on this issue. By the end of the conversation things had returned to a somewhat more cordial state. There followed, however, during the first week of June, an exchange of letters between Attorney Ebitz and Attorney Rella in which Attorney Ebitz claimed that she had spoken with Mr. Demmons as a potential witness, not as an adverse party, so Maine Bar Rule 3.6(f) was not applicable. She further stated that she had never seen Michael Demmons as an adverse party in this case, despite the fact that he owned the trailer where the injury occurred; but rather had identified Walter Demmons, Michael's father, (and despite his non-ownership of the property also a named insured on the Concord Group policy) as the potential defendant. This was the last exchange, written or oral, regarding the case between Attorneys Rella and Ebitz.

Attorney Ebitz subsequently communicated with counsel for Walter Demmons who suggested to her that suing Walter was inappropriate (since he neither owned nor controlled the premises) and further that Walter Demmons would sue Attorney Ebitz personally for abuse of process if she proceeded against Walter Demmons for Clyde Smith's injury. At that time, Attorney Ebitz withdrew from representing Clyde Smith regarding his injury and was replaced by Attorney Margaret Shaloob as successor counsel.

Attorney Rella was still bothered by the communication between Attorney Ebitz and Mr. Demmons. He was concerned about his obligation to report the incident under Bar Rule 3.2(e). He discussed this matter with his partners. He was genuinely concerned about his obligation over the next several weeks. Although he had not in his May 9 conversation with Attorney Ebitz specifically stated that he was representing Michael Demmons he thought that a reasonable attorney should have inferred that from his involvement with the file to date. His concern developed a practical aspect when it became clear to him that if he attempted to exclude affidavit #2 from a trial (if a suit were filed in this matter) as a result of the affidavit's having been obtained in violation of Bar Rule 3.6(f), he would be asked by the sitting judge whether he had reported that rule violation. He was even concerned that the judge could subsequently report him for having violated Bar Rule 3.2(e), for not having reported another attorney's conduct in violation of the Bar Rules that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer. In a letter dated August 6, 1996, Attorney Rella did report Attorney Ebitz for violation of Bar Rule 3.6(f).

Attorney Ebitz, in her own testimony admitted she was very angry that Attorney Rella had reported her conduct when she said she thought the matter was long behind her. During her testimony she further admitted that she filed her complaint against Attorney Rella in anger, and that given the time that had passed since then, she recognized that it was bad judgment on her part to have done so. Her complaint alleged that Attorney Rella had filed his complaint against her in violation of Maine Bar Rule 3.6(b), i.e., solely for the purpose of gaining an advantage in the underlying litigation. The Board consolidated these matters for hearing.

III. DECISION—ATTORNEY RELLA

The testimony elicited at the hearing made it clear that Attorney Rella was not concerned about gaining an advantage in the litigation as any substantial reason for filing the complaint against Attorney Ebitz. Attorney Rella was concerned about his obligation under the Bar Rules regarding attorney misconduct of which he had knowledge. Affidavit #2 probably had minimal value for the plaintiff's case and, at the time he filed the complaint, new counsel was on board and a settlement conference had been scheduled. Every indication from the new counsel was that she was most anxious to settle this case, even at a minimal value such as cost of defense. Because the Bar Rule in question sets out as a standard that the complaint was filed SOLELY for purposes of gaining an advantage in the litigation, it is clear there was no violation of this rule by Attorney Rella and the complaint against him is hereby dismissed.

IV DECISION—ATTORNEY EBITZ

With regard to the complaint against Attorney Ebitz, she admitted during her testimony that she had violated Bar Rule 3.6(f) by contacting Mr. Demmons; that she had inappropriately filed the complaint against Attorney Rella; and that she had been "less than candid" when she wrote to Attorney Rella that she had always considered Walter Demmons, rather than Michael Demmons, as the potential defendant in the suit to be filed by Clyde Smith. She has thus admitted violating Maine Bar Rules 3.1(a), 3.2(f) (2) and (3) and 3.6(f). These admitted violations of the Bar Rules include conduct involving dishonesty, misrepresentation, and conduct unworthy of an attorney. If after contacting Mr. Demmons, Attorney Ebitz had been forthcoming with opposing counsel and with bar counsel as to her "mistake," we might have considered this a minor violation. Affidavit #2 was not substantially different from Affidavit #1 and there was little harm done to either client, to the public, or to the administration of justice.

Ms. Ebitz' attorney has requested that we dismiss this complaint with a warning to her. In order to do that we must establish (1) that the violation was minor; (2) that there was little harm to the client, the public, or the administration of justice, and (3) that there is little likelihood it will reoccur. It is the third part of this three-pronged test that concerns this Panel. The original rule violation here was, in fact, minor and there was little or no harm to the client, the public, or the administration of justice. However, Attorney Ebitz' conduct subsequent to the rule violation compounded the error and causes our concern about the likelihood of its reoccurrence. In addition, Attorney Ebitz was suspended from the practice of law for a period of six months in 1992 for a violation of the Bar Rules that involved dishonesty. As a result of that prior record and as a result of her conduct after the rule violation, we cannot dismiss this matter with a warning. We, therefore, reprimand Ms. Ebitz for her conduct in this matter.

Date:	5.26-98	Jusan Ell
		Susan E. Hunter, Esq., Acting Chair, Panel A
		Par Nica Gullin
		Patricia G. Worth, Esq.

Andrew Pease, Jr.